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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 147

L. W. FERRELL and Jo FERRELL, Next Friends of PHILLIP FERRELL, ET AL.,

Petitioners,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 3, 1968

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Petitioners L. W. and Jo Ferrell, Next Friends of Phillip Ferrell, June Webb, Next Friend of Stephen Webb, and V. R. and Margaret Jarvis, Next Friends of Paul Jarvis, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 29, 1968.

OPINIONS BELOW

The majority, concurring and dissenting opinions of the Court of Appeals are not yet reported but are printed in Appendix B hereto together with the judgment and order denying rehearing, *infra*, p. B-1. The opinion of the District Court is reported at 261 F. Supp. 545 (Northern District of Texas 1966) and is printed in Appendix A hereto, *infra*, p. A-1.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 29, 1968. Rehearing was denied on April 30, 1968. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

Whether a state free public school's regulation requiring petitioners to wear their hair in a manner satisfactory to school authorities as a prerequisite to enrollment is (1) a denial of due process under the Fourteenth Amendment, (2) unlawful under the laws and Constitution of the State of Texas, and (3) violative of the Civil Rights Act, 42 U.S.C., Sections 1981 and 1983.

STATUTES INVOLVED

The statutes involved are the Constitution of the State of Texas, Article VII, Section 1, Vernon's Annotated Constitution of the State of Texas, Articles 2902 and 2904, Vernon's Annotated Texas Civil Statut-

es, the Fourteenth Amendment to the U. S. Constitution, and Sections 1981 and 1983 of the Civil Rights Act, 42 U.S.C. The Texas statutes and the cited portions of the Civil Rights Act are printed in Appendix C, *infra*, p. C-1.

STATEMENT OF THE CASE

Petitioners are minors of school age residing in Dallas, Texas, and represented by their natural parents as next friends. In September, 1966, Petitioners attempted to enroll in the W. W. Samuell High School, a facility of the Dallas Independent School District, located in the City of Dallas, Texas. On the opening day of school Petitioners reported to the office of Mr. Lanham, the Principal of W. W. Samuell High School. Prior to the commencement of the 1966 school year, school personnel had advised Petitioners that they would not be allowed to register for admission to the high school because of their hairstyle.

Mr. Lanham refused to admit Petitioners to school unless and until they cut and trimmed their hair to his satisfaction. Petitioners sought admission to other schools within the school district but admission or transfer was denied. The Principal gave as his reason for denying Petitioners the right to enroll that their hairstyle would be a disturbing influence in the school.

Petitioners filed suit in the U. S. District Court for the Northern District of Texas to compel the Dallas Independent School District, its officers and agents, including its superintendent, W. T. White, and the prin-

cipal of W. W. Samuell High School, W. S. Lanham, to permit their registration, and to restrain the school district, its agents and employees from interfering with their proper matriculation. Petitioners raised in their pleadings in the District Court the same questions that are presented to this Court. The District Judge filed a memorandum opinion containing his findings of fact and conclusions of law in which a temporary restraining order against the school district and its representatives was dissolved and the request of petitioners for injunctive relief was denied.

The Fifth Circuit Court of Appeals by its majority opinion, Judge Tuttle dissenting, affirmed the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

1. This case presents important issues of interference with constitutional rights of free expression as the basis for denying Petitioners a free public school education. The majority opinion of the Circuit Court conflicts with the principles established by this Court in *Dennis v. United States*, 341 U.S. 494. The majority below assumed that Petitioners' hairstyle was "a constitutionally protected mode of expression." The majority then concluded that interference with this right was justified by reason of the Principal's fear of disturbances if Petitioners were permitted to enroll. However, since Petitioners were never permitted to enroll or enter classes, such fears were entirely speculative

and conjectural. This interference with Petitioners' rights was clearly unlawful under the *Dennis* rule that "in each case courts must ask whether the gravity of the 'evil', discounted by its probability, justifies such invasion of free speech as is necessary to avoid the danger"

Of particular importance in this case is the nature of the rights which the majority opinion protects. These protected rights are summarized in the majority opinion (infra, pp. B-7, 8) as follows:

> 1. The right of a "group of boys" to decide that a classmate's hair was too long and "to take the matter in their own hands and trim it themselves."
>
> 2. The right to subject boys with long hair "to substantial harrassment."
>
> 3. The right to use "obscene language" with reference to classmates with long hair.
>
> 4. The right to challenge long-haired boys to fight because other boys "did not like long hair."

As correctly pointed out in Judge Tuttle's dissent, it is the disruptive acts of the harrassing students that should be regulated, not the expressions of individuality by Petitioners. The majority opinion enforces conformity on Petitioners in violation of this Court's opinion in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, wherein it was held that the symbolism

of a flag salute could not constitutionally be imposed upon students, this Court ruling as follows:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

The majority opinion also conflicts with the prior opinion of the Fifth Circuit in *Burnside v. Byars*, 363 F. 2d. 744 (5th Cir. 1966), where it was held that children could not be expelled from school for wearing "freedom buttons" where there was no commotion or disruption of classes. The Fifth Circuit there held that the presence of the buttons did not unduly hamper the school "nor would it seem likely that the simple wearing of buttons unaccompanied by improper conduct would ever do so."

The denial of a free public school education to Petitioners solely by reason of their hairstyle conflicts with the decision of this Court in *Brown v. Board of Education of Topeka*, 347 U.S. 493, in which it was held that where the state undertakes to provide an educational opportunity, it is "a right which must be made available to all on equal terms." As stated by Judge Tuttle in his dissent below, the classification of students by hairstyle is "utterly unreasonable."

2. The majority decision conflicts with the Texas statutes and decisions in the crucial area of the right to

free public education. Article 2902 provides that Petitioners are entitled to the benefit of public school funds. Article 2904 provides that pupils may be suspended only when found guilty of "incorrigible conduct" and even then, may be suspended only for the current term. The Dallas Independent School District has permanently suspended Petitioners, without any finding by the courts below that Petitioners have been guilty of incorrigible conduct.

Texas courts have ruled in several cases that the discretion of a school board is limited in denying enrollment or suspending students for conduct which merely violates the standards of conformity adopted by the trustees, without interfering with the operation of the schools. In *Carrollton - Farmers Branch Independent School District v. Knight*, 418 SW 2d 535 (Texarkana Civ. App. 1967) *err. ref., n.r.e.* the court held that the school district had no power to suspend for a period of three weeks students who married and to require such students to reapply for admission. In *Alvin Independent School District v. Cooper*, 404 SW 2d 76, (Houston Civ. App. 1966) the regulation of a school district excluding from school the mother of a child was held invalid. In *Anderson v. Canyon Independent School District*, 412 SW 2d 387 (Amarillo Civ. App. 1967) the school board was not permitted to compel students who married during the school term to withdraw from school for the remainder of the school year.

3. The majority opinion below conflicts with Section 1983 of the Civil Rights Act, 42 U.S.C. In finding no violation of the Civil Rights Act reliance was made upon *Byrd v. Sexton*, 277 F. 2d 418 (8th Cir. 1960). The *Sexton* opinion applies a two part test as a standard to obtaining relief under the Civil Rights Act, first, whether there has been a violation of state law, and second, whether the plaintiff is a member of a class which the Civil Rights Act was designed to protect. The *Sexton* opinion concludes that relief under the Civil Rights Act is limited to racial questions. This construction of the Civil Rights Act should be reviewed and reversed by this Court because it violates the express terms of this important statute, and engrafts on the Civil Rights Act the very kind of discrimination which the Act was intended to eliminate.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the

UNITED STATES DISTRICT COURT

For The Northern District of Texas
Dallas Division

Civil Action
No. 3-1670

L. W. FERRELL and JO FERRELL,
Next Friends of PHILLIP FERRELL:
JUNE WEBB, Next Friend of STEPHEN
WEBB, and V. R. JARVIS and MARGARET
JARVIS, Next Friends of PAUL JARVIS,

Plaintiffs,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
W. T. WHITE and W. S. LANHAM,

Defendants.

OPINION

Plaintiffs brought this action for an alleged violation of the right of the minor plaintiffs, Phillip Ferrell, Stephen Webb, and Paul Jarvis, to attend W. W. Samuell High School in the Dallas Independent School District, alleging that jurisdiction of this court was

based upon §1 of Article 14 of the United States Constitution and the Civil Rights Act of 1964, Public Laws 88-352, Title 42, U.S. Code Annotated, and particularly §§ 1981, 1983 and 2000A. Plaintiffs alleged that the minor plaintiffs were, in all respects, qualified to enter the academic facilities of the Defendant, Dallas Independent School District, but were being denied the right to admission and enrollment solely because of the length and style of the minor plaintiffs' hair; that Defendant W. S. Lanham, Principal of W. W. Samuell High School, discriminated against the minor plaintiffs and that such action was arbitrary, discriminatory, and violated the constitutional right of plaintiffs to equal opportunity for a public education. Because of the recognized importance of an education and the importance of classroom work at the commencement of school, a temporary order requiring admission of the minor plaintiffs was granted pending hearing and was made returnable to the Court on September 22, 1966.

Defendants, Dallas Independent School District, W. T. White, Superintendent of the Dallas Independent School System, and Defendant W. S. Lanham, Principal of the W. W. Samuell High School, answered and among other things questioned the jurisdiction of this Court on the ground that no question arising under the Constitution or laws of the United States was before this Court. The Defendants also claimed that the alleged Federal questions were frivolous and unsubstantial, and also that the Court had no jurisdiction for

the reason that plaintiffs had failed to exhaust their administrative remedies by submitting or presenting to the Board of Education of the Dallas Independent School District, State Commissioner of Education, and the State Board of Education, the alleged claim. These legal defenses were taken under advisement and the Court proceeded to hear the testimony offered by plaintiffs and Defendants.

It appears from the testimony that on the morning of September 7, 1966, the opening day of school, instead of reporting to their home rooms, as was the usual procedure, the Plaintiff Stephen Webb, accompanied by his mother, the Plaintiff Phillip Ferrell, accompanied by his mother, and Plaintiff Paul Jarvis, accompanied and represented by Kent Alexander, the booking agent of the minor plaintiffs, went to the office of Mr. Lanham, the Principal of W. W. Samuell High School. The purpose of this visit was to confer with Mr. Lanham, it being understood that admission to the high school would be denied by Mr. Lanham because of the hair style of the boys. Mr. Lanham refused to admit the boys to school and advised them to get their hair cut or trimmed before coming back to enroll.

The minor plaintiffs are members of a musical group or "combo" known as Sounds Unlimited, and insisted to Mr. Lanham that they were under contract with Mr. Alexander to maintain their dress and personal appearance, including the so-called "Beatle" type hair style. The contract, Plaintiffs' Exhibit 11, is in evidence

and does so provide. There seems to be little question, however, under Texas law, that this contract is unenforceable insofar as the minors are concerned. 30 *Tex. Jur. 2d* 678, *Infants*, § 19, et seq.

As described by the mother of Stephen Webb, who was 18 years of age on September 7, 1966, Stephen's hair "is over his ears, but one can see the lobe of his ear. It is not over his collar, but is over his forehead and down to his eyebrows." As described by the mother of Paul Jarvis, "his hair is about 1 inch over his ears and about 1½ inches above his eyebrows." Phillip Ferrell's hair, if hanging straight forward, would come below his eyebrows, but is combed and turned to the side so as to be a very short distance above his eyebrows. The hair extends down to the ear lobe on the side and to the collar in the back. This hair style adopted by these plaintiffs is in conformity with the so-called "Beatle" type hair style. There are numerous pictures admitted in evidence in the record, not only of plaintiffs, but also of other musical combos, more accurately showing this Beatle type hair style. Among other things, the boys testified that they had attended W. W. Samuell High School the year before and that their hair during that school year had been as long as it was on September 7, 1966.

After being refused admission to W. W. Samuell High School, the boys went to several other Dallas High Schools seeking admission by transfer from the Samuell High School District. They were advised by

Mr. Lanham that it was too late to make application for transfer to another high school. Within a short time the boys went to the Administration Building of the Dallas Independent School District to see the Superintendent, and according to the testimony of Paul Jarvis, were met on the steps by a Mr. Allen, whom he understood to be the Assistant Superintendent. They were advised by Mr. Allen that there was no rule concerning the length of a boy's hair and that the Principal of each school set his own rules and regulations in this regard and that there was no written rule in the book. It also appears that Mr. Lanham first told Paul Jarvis that he would be admitted, but would have to have his hair trimmed in a couple of days. However, when Jarvis went to school the next day he was advised by Mr. Lanham that the matter had been reconsidered and that he would not be admitted until he did have his hair trimmed.

Plaintiffs called to the witness stand some seven young boys, ages 17 and 18, who had the Beatle type hair style, three of whom attended W. W. Samuell High School, two of whom attended Mesquite High School, one of whom attended W. T. White High School, and one of whom was attending Dallas Junior College. From their testimony it appeared that this type hair style had been in vogue about three to three and a half years and that some problems had developed in the beginning, but that this type of hair style was now generally accepted by other students and occasioned

no difficulties at this time. One of the Mesquite High School students testified that he thought that the coaches, athletes and teachers created whatever problems developed in regard to the long hair. There was some testimony to the effect that some of the athletes at a nearby high school were now wearing the Mohawk style haircut.

Plaintiffs called Principal Lanham to the stand, and on this examination it appears that in his administration of the W. W. Samuell High School he was governed by the Policy Book of the Dallas Independent School District; that he was charged with controlling the attire of a student; that the boys' long hair caused trouble and commotion; that the long hair frequently caused the exchange of obscene remarks to the long-haired boys; that the long hair did attract attention and was disruptive in the classroom; that he had not ruled out long hair, but did not accept the extreme Beatle type hair style. It also developed from Mr. Lanham's testimony that on the night of September 6 Kent Alexander, the boys' agent, had called him at home inquiring whether or not these particular boys would be admitted and, among other things, Mr. Alexander advised him that he had $4000.00 invested in these boys and that he was willing to invest another $1000.00. Mr. Lanham further testified that the boys in question should have gone to their home room to get their schedules and then to later enroll, in which event he would not have seen them for possibly two or three weeks; that the Alexan-

ander phone call and the appearance of the boys at his office on the opening day of school constituted a challenge to his authority and his responsibility to maintain good order and discipline in the school. Mr. Lanham also said that there was a correlation between discipline and dress or attire.

Plaintiffs also called to the stand Dr. W. T. White, Superintendent of the Dallas Independent School District. Dr. White produced the "Book", which, is entitled "Administrative Policies and Procedures of the Dallas Independent School District." It appears in the record as Defendants' Exhibit 2. Among other things, these administrative policies and procedures provide, Page 83, as follows:

> "PUPILS — CONDUCT, OFFENSES, AND PUNISHMENTS
>
> "ATTIRE
>
> "Principals will determine when attire of students is in good taste.
>
> "CONDUCT
>
> "Children may be held responsible for their conduct to and from school if it affects school organization, school morale, or destruction of public or private property."

In this connection, Dr. White said that attire had to do with the appearance of the child. With reference to duties and responsibilities of the Principal and Assistant Principal, (page 164), it is provided that the Principal is the Chief Administrator in his building and, as such, he is fully responsible for all areas of operation, either

through personal action or through assignment to personnel in the building. Dr. White testified that this book is partially the Principal's guide and that there must be added common sense, tact, firmness and policy guidance by the Superintendent of Schools or from an authorized staff member; that results of the program in his building come to him for credit or discredit; and that the Principal's areas of responsibility are in administration, organization, operation, instruction, curriculum, supervision, personnel, pupil management, budget, parent relations, public information, and leadership. Dr. White further testified that the matter of length of a boy's hair was within the authority of the Principal and that in this case he felt that the authority of the Principal to run his school had been called into question. Dr. White further said that through a telephone call he advised one of Plaintiffs' attorneys that he, as Superintendent of the schools, would stand behind the Principal. It appears further from the testimony that there was a second confrontation with Mr. Lanham on the following day, September 8. Prior to this incident, the booking agent, Alexander, affectionately called "Alexander, the Great" by the boys, had notified three television stations and about half-a-dozen radio stations of the situation at the school and suggesting the presence of these news media at the school on the coming day. The radio and television reporters responded and following this conference with Mr. Lanham, the group conducted interviews with and were photographed by these news

representatives. The story was subsequently reported on all television channels complete with films and interviews, in both of the local newspapers and received nationwide attention through the wire services.

It was also developed by the defendants that immediately after being refused admittance the "Sounds Unlimited" proceeded to a local recording studio and recorded a song entitled, "Keep Your Hands Off of It." Copies of the record were produced and distributed by the agent to the various radio stations in the area, and was subsequently played on the air by these stations. This record was played in open court, and to say the least, it was an excursion into cacaphony. The words went something like this:

"Went to school, got kicked out,
Said it was too long, now we're going to shout.

(Chorus)

"Keep your hands off of it,
Keep your hands off of it,
It don't belong to you.
"Bopped upon the steps, Principal I met,
You're not getting in, now what do you want to bet.

(Chorus)

"Went this morning, tried to get in,
The kids were for us, but we still couldn't win.

(Chorus)

"HAIR, THAT IS." (Defendants' Ex. #1)

The first legal point to consider is whether this court has jurisdiction over this cause of action. One of de-

fendants' grounds for dismissal is the failure of the plaintiffs to exhaust their administrative remedies by submitting or presenting it to the Board of Education of the Dallas Independent School District, the State Commissioner of Education and the State Board of Education. (Vernon's Ann. Tex. Stats., Art. 2654-5, § 1; Art. 2656, 2654, § 2, 2654-7 § 1). Under Title 42, U.S.C.A., §1983, one of the alleged grounds for jurisdiction of this cause, the failure to first seek remedies under state law, will not defeat an application for relief under this Act. (*McNeese v. Bd. of Education, Cahoka, Ill.*, 83 S.Ct. 1433, 373 U.S. 668, 10 L.Ed. 2d 622; *Monroe v. Pape*, Ill. 1961, 81 S.Ct. 473, 365 U.S. 167, 5 L. Ed. 2d 492.)

Another ground for dismissal for lack of jurisdiction is that the alleged federal questions are "frivolous and unsubstantial." With this contention we do not agree, and are of the opinion that the matter is controlled by the now historic case of *Brown v. Board of Education of Topeka, et al*, infra:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and

> helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 493, 74 S. Ct. 691.

The Constitution of the State of Texas, Art. 7, § 1, reads as follows:

> "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

The Defendants' Motion to Dismiss for lack of federal jurisdiction is overruled and it is our opinion that the Federal District Court is a proper forum for the determination of the question presented here.

The problem that causes this court the most concern is whether or not the actions by the school authorities deprive plaintiffs of any rights guaranteed by the Constitution and Laws of the United States. The plaintiffs contend they are arbitrarily being denied the right to a public school education which the state has undertaken to provide for all. These facts are considered because the determination here becomes more specifically: Were the actions of the school authorities in excluding the plaintiffs from high school unlawful under state law? This was the first part of a two-part test used in *Byrd*

v. Sexton, 277 F. 2d 418 (cert. den.). The remainder of the test used by the court in that case then became: Were the school authorities motivated to act the way they did by reason of plaintiffs' membership in some class or group of persons which the United States has determined to protect? There, the plaintiffs had to prove the first requirement before this second part of the test would be applied. In that case, the court assumed that state law had been violated, but determined, after consideration of recent segregation cases (Brown v. Bd. of Ed., *supra*, etc.) the history of the civil rights statutes[1], the atmosphere under which the statutes were enacted[2], and the statutes' limited recognition in the courts, that the plaintiff claimed no invalidity of state law or of state constitutional provision, but at the most complained of acts said to be improper under the state Constitution. The Court further determined that plaintiff's cause of action, if any, was for invasion of personal rights for which state laws and state forums provide the avenue of relief and "because the decisions which

[1] These sections come into the present Code from the old Revised Statutes, § 1979 and §1980, respectively, and those in turn had their origin in the early Civil Rights Acts, particularly the Act of April 20, 1871, 17 Stat. 13, adopted soon after the Civil War to implement the then recent Thirteenth, Fourteenth and Fifteenth Amendments. They were thus designed for a specific purpose. This history and this purpose have been noted and emphasized by the Supreme Court, Hague v. C.I.O., 307 U.S. 496, 509-10, 59 S.Ct. 954, 83 L.Ed. 1423; United States v. Williams, 341 U.S. 70, 73 et seq., 88, 71 S.Ct. 581, 95 L.Ed. 758; Collins v. Hardyman, 341 U.S. 651-656, 71 S.Ct. 937, 95 L.Ed. 1253; Stefanelli v. Minard, 342 U.S. 117, 121, 72 S.Ct. 118, 96 L.Ed. 138; see Mr. Justice Roberts, dissenting, in Screws v. United States, 325 U.S. 91, 140 et seq., 65 S.Ct. 1031, 89 L.Ed. 1495; Love v. Chandler, 124 F. 2d 786; Francis v. Lyman, 216 F. 2d 583 at 586.

[2] Byrd v. Sexton, supra, at p. 427 ff.

have been promulgated, * * * seem to us clearly to outline a specific and narrow area of applicability of the statutes and one which the plaintiffs' case does not reach." (Byrd v. Sexton, *supra.)*

Counsel for plaintiffs contend that *Byrd v. Sexton* is distinguishable on the grounds that it was a suit for damages and the instant case is one seeking equitable relief. The Supreme Court has made passing references to these sections as providing relief in appropriate situations[3], and has used them as a basis for granting equitable relief[4]. However, where the Court felt that the complaint established a case within the adjudicatory power of the federal courts under the statutes, or assumed that it did, it has been cautious in granting relief where to do so would interfere with state court proceedings or where "the proper balance between the States and the federal government in law enforcement" would be affected. See *Screws v. United States*, 325 U. S. 91, 108; 65 S.Ct. 1031, 1039, 89 L. Ed. 1495, and *Stefanelli v. Minard*, at page 121 of 342 U.S.; at page 120 of 72 S.Ct., or until every chance has been given the state courts first to construe the challenged state regulations, *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 79 S.Ct. 1025; 3 L.Ed. 2d 1152. These contingencies are perhaps best illustrated by Mr. Justice Frankfurter's

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[3] *Ray v. Blair*, 343 U.S. 214; 72 S.Ct. 654; *O'Sullivan v. Felix*, 233 U.S. 318, 34 S.Ct. 596; see Mr. Justice Frankfurter's dissent in *Burns v. State of Ohio*, 360 U.S. 252, 79 S.Ct. 1164

[4] *Hague v. C.I.O.*, 307 U.S. 496, 59 S. Ct. 954; *Brown v. Bd. of Education, supra; U.S. v. Raines*, 80 S.Ct. 519.

comment, concurring in *Snowden v. Hughes*, at page 16 of 321 U.S.; at page 405 of 64 S.Ct.:

> "Our question is not whether a remedy is available for such illegality (if any), but whether it is available in the first instance in a federal court. Such a problem of federal judicial control must be placed in the historic context of the relationship of the federal courts, with due regard for the natural sensitiveness of the states and for the appropriate responsibility of state courts to correct the action of lower state courts and state officials."

With these ideas in mind we desire to at least comment on the merits of this case insofar as they affect the jurisdiction of this court. This case has received a great deal of publicity and aroused a great deal of feeling in the community. It is felt therefore that we should say more than merely whether or not this Court has jurisdiction to rule on this case. At the outset it should be emphasized that this is a case involving high school students and their administrators; we in no way even propose to consider such a situation arising between college students and their administrators. *(Marshall, et al v. Dr. George Oliver, Pres. Richmond Prof. Inst., et al.*, cert. den. Nov. 14, 1966, 385 U.S. 945; involving the rights of students at the institute to wear long hair and beards. Here the action of the school authorities was upheld.)

Having determined now that this court has jurisdiction of this case, what are the questions the court must resolve? Referring to the first part of the test an-

nounced in the *Byrd* case — were the school authorities legally authorized to formulate the regulation that students' hair shall not be of "Beatle-length"? There are two ways to approach this problem of authorization. The court could focus on the school administration and attempt to justify the regulation by emphasizing the educational need for an academic atmosphere and the resulting demand that disturbances be kept to a minimum. Or, it can focus more directly on the individual student and evaluate the need for regulation by examining the purpose of public school education in terms of the individual. The regulation must serve both purposes. We feel that where the effects of the regulation extend beyond the classroom and bear directly on the student's person and his freedom of expression, the latter approach provides a more reasonable basis for school concern, and it is here that the court should look to justify the regulation. (The Power of *School Officials to Regulate Student Appearance*, 3 Harv. Legal Comm.)

Since confusion and anarchy have no place in the classroom, school authorities must control the behavior of their students. If the student's dress is lewd or his appearance is a studied effort to draw attention to himself, his presence is disruptive — such behavior is no different than verbal rudeness.

> "Where the student's deviant appearance is not a manifestation of a negative antisocial personality, the problem becomes more difficult. It puts a strain on the words to prohibit the wearing of clean, combed, long hair in the name of educational ef-

> ficiency. And such reasoning can be circular since the school's effort to single out such behavior as disruptive often creates the disruption. This is especially true when the issue is long hair. The Beatle-cut is the current fad, and at summer's end, extra long bangs are not a novelty among teenagers. The educational system suffers many minor disruptions every day; the interstudent feud that starts during school hours, and the classes that are cut to manufacture prom decorations. It should not be so finely tuned that it clogs on an extra two inches of hair." (3 Harv. Legal Comm., *supra.*)

It is difficult moreover to determine in a specific case the extent to which school authorities should concern themselves with what they consider improper student appearance or behavior when such regulation would impinge on the student's freedom and the individual parent's right to raise his child as he sees fit.

The testimony here showed that Mr. Lanham, the Principal, acted on the basis of some prior incidents involving students with long hair. Further testimony from high school students revealed that there were no longer any disturbances resulting from long hair on boys because it "had been around three or four years and everyone was used to it." Other evidence tended to show that long hair on men was part of a "total look" called the "Mod" look.

The regulation in question here arises from the generally accepted proposition that the superintendent, principal, and board of trustees may officially exercise whatever powers of control, restraint, and correction

over pupils as may be reasonably necessary to "enable teachers to perform their duties and to effect the general purposes of the educational system. (51 Tex. Jur. 2d., §237; *Bishop v. Houston Ind. School Dist.*, 119 Tex. 403, 29 S.W. 2d 312; *Dallas v. Mosely*, CA 286 S.W. 497; *Boseman v. Morrow*, CA 34 S.W. 2d 654). Two other cases involving students with long hair, although from other jurisdictions, have influenced the decision in this case. Foremost of these is the case of *Marshall et al v. Dr. George Oliver* (*supra*), where the U. S. Supreme Court dismissed an appeal from the Supreme Court of the State of Virginia. If a state has constitutional authority to regulate the appearance of college students, *a fortiori*, it has the same power over high school students. The other case is *Leonard et al v. School Committee of Attleboro et al*, 212 N.E. 2d 468, where the Supreme Court of Massachusetts held that regulations which barred a student with an extreme haircut from attending classes solely because of length or appearance were not unreasonable or arbitrary and had a reasonable connection with the successful operation of public school.

This court is concerned for the welfare of the individual plaintiffs in this case, but feels that the rights of other students, and the interest of teachers, administrators and the community at large are paramount. It also appears that there is a fairly reasonable indication that this situation could have been deliberately planned by the previously mentioned "agent" for the boys. The

phone call to the principal's home and the subsequent confrontation of the principal by the boys and their agent, followed immediately by a song and news interviews (previously arranged by the agent), give support to this supposition. Plaintiffs contend naturally that their primary interest is to get an education, but it appears that they want this education on their own terms. It is inconceivable that a school administrator could operate his school successfully if required by the courts to follow the dictates of the students as to what their appearance shall be, what they shall wear, what hours they will attend, etc.

One of the most important aims of the school should be to educate the individual to live successfully with other people in our democracy. Since the school authorities, by legislative grant, control the public educational system, their regulations play a part in the educational process. This is but another way of stating that society expects public education to concern itself with building young citizens as well as teaching the "3 R's". It does not appear from the facts of this particular case that there has been any abuse of discretion on the part of the school authorities. On the contrary, it appears that they acted reasonably under the circumstances, taking into consideration these individual students *and* the need for an academic atmosphere. The school principal felt that his authority was being challenged when the boys did not follow the usual registration procedure, but came instead to his office with the proposition that

they were under contract to keep their hair "Beatle Length" and did not intend to cut it. It is, therefore, the opinion of this Court that there has been no violation of minor plaintiffs' rights, either state or federal, by the school authorities. For this reason Plaintiffs' case fails to pass this first part of the test heretofore announced. Further, the terms upon which a public free education is granted in the high schools of Texas cannot be fixed or determined by the pupils themselves. Nor is a contract which is unenforceable against the minor plaintiffs in this State to be considered determinative of the right.

The temporary restraining order is dissolved and the motion for temporary injunction is denied.

This Memorandum Opinion is in lieu of findings of fact and conclusions of law.

/s/ W. M. TAYLOR, JR.
W. M. Taylor, Jr.
United States District Judge

APPENDIX B

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 24301

L. W. FERRELL and JO FERRELL, Next Friends of PHILLIP FERRELL, ET AL.,

Appellants,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(March 29, 1968.)

Before TUTTLE, GEWIN and GODBOLD, Circuit Judges.

GEWIN, Circuit Judge: Appellants, Phillip Ferrell, Stephen Webb and Paul Jarvis, all minors, were denied enrollment at the W. W. Samuell High School of Dallas, Texas, because of their "Beatle" type haircuts. Suit was brought on September 12, 1966, in the United States District Court for the Northern District

of Texas by their natural parents as next friends against the Dallas Independent School District for injunctive relief. Appellants' application for a temporary restraining order was granted by the district court on September 13. However, following a full and complete hearing on the matter, the court dissolved the temporary restraining order and denied appellants' motion for a temporary injunction. 261 F. Supp. 545. We affirm.

Appellants contend that the school's regulation requiring them to cut or trim their hair as a prerequisite to enrollment is (1) unlawful under the laws and constitution of the State of Texas, (2) a denial of due process under the fourteenth amendment and (3) is discriminatory under the Civil Rights Act, 42 U.S.C. §§ 1981 and 1983. Before we resolve these several contentions, we feel that a detailed statement of the facts of this case is necessary.

Appellants are members of a musical group or combo known as "Sounds Unlimited". Each has what is commonly known as a Beatle type haircut.[1] Appellants are

[1] The hair styles of appellants are described in the following excerpt from the trial court's opinion:.

> "As described by the mother of Stephen Webb, who was 18 years of age on September 7, 1966, Stephen's hair 'is over his ears, but one can see the lobe of his ear. It is not over his collar, but is over his forehead and down to his eyebrows.' As described by the mother of Paul Jarvis, 'his hair is about 1 inch over his ears and about 1-1/2 inches above his eyebrows.' Phillip Ferrell's hair, if hanging straight forward, would come below his eyebrows, but is combed and turned to the side so as to be a very short distance above his eyebrows. The hair extends down to the ear lobe on the side and to the collar in the back. This hair style adopted by these plaintiffs is in conformity with the so-called 'Beatle' type hair style."

of the opinion that their hair style conforms to the standards, customs and usage within the field of entertainment and is a necessary element of attraction and performance.[2]

Prior to the commencement of the 1966-67 school year, appellants were aware that the length and style of their hair would be objectionable to school authorities. In fact, one of them, Paul Jarvis, had cut his hair so as to attend summer school during the summer of 1966.

Enrollment in the W. W. Samuell High School for the school year 1966-67 was scheduled for September 7. On the evening of September 6, the business manager or booking agent of Sounds Unlimited, Mr. Kent Alexander, sometimes referred to as "Alexander the Great," called the school principal, Mr. W. S. Lanham, at his home to discuss the matter of enrollment. He advised the principal that he had $4,000.00 invested in appellants and planned to invest an additional $1,000. Mr. Alexander also advised the principal that he was

[2] A portion of the contract between appellants and their business manager, Mr. Alexander, reads as follows:

> "It is further understood and agreed between Agent and Principle that Principle and each member of Principles organization [sic] shall maintain their dress and personal [sic] appearance in conformity with accepted STANDARDS and CUSTOMS OF ROCK & ROLL GROUPS, COMBO'S & BANDS including so called BEATLE TYPE HAIR STYLES."

Certainly we are aware that such contract is unenforceable against appellants, all of them being minors. 30 Tex. Jur. 2d 678, Infants, § 19, et seq. However, such contractual terms do indicate the importance of hair style as to the several parties to the contract.

coming to the school in connection with appellants' enrollment. However, he was told that the principal would talk only to the boys and their parents. Mr. Alexander then stated that he would bring the radio and television media to the school.

To enroll, students had been informed to report to their previously assigned homerooms on September 7. Contrary to this usual procedure of enrollment, the appellants accompanied by the mothers of two of them and Mr. Alexander went to the principal's office.[3] A conference was held between the principal, the boys and the two mothers, Mr. Alexander being excluded.[4] At this conference there was a discussion about the boys' rights, school discipline and the principal's position. The principal informed the parties that pursuant to authority delegated to him as principal by the Dallas Independent School District he has established rules and regulations concerning the appearance of students

[3] The record reveals two reasons as to why the boys went to the principal's office rather than reporting to their home-rooms as was the custom. Two of the boys testified that they preferred getting the matter of their hair settled from the beginning rather than running the risk of being confronted with it later or sneaking around school trying to avoid detection. The third boy testified that he was advised by Mrs. Gilbert, Dean of the Girls, that he would not be admitted to school on account of his hair but would have to go directly to Mr. Matthews, Assistant Principal, or Mr. Lanham in order to be admitted.

[4] Apparently there was some confusion as to Mr. Alexander's status on the day of the conference. It appears from the record that he was present as a representative of Mr. Jarvis, Paul's father, with authority to speak for Mr. Jarvis. However it seems that in the confusion this fact was not clearly understood by the school authorities. At any rate, Mr. Alexander was not permitted to attend the conference.

at the school.[5] It was the opinion of the principal that the length and style of the boys' hair would cause commotion, trouble, distraction and a disturbance in the school and, therefore, it was necessary for their hair to be cut or trimmed before admittance would be allowed. Appellants advised the principal that they would not cut their hair. Accordingly, Stephen Webb and Phillip Ferrell were thereupon denied admission to the school. Paul Jarvis, whose hair had not yet attained the length of the other two, having been previously trimmed for summer school, was not refused admission until later at which time his hair had apparently grown to a point where in the opinion of the principal it would be a disturbing influence in the school.

True to his word, Mr. Alexander had called newspapers, radio stations and television stations to be present at the school on September 7. At the conclusion of the conference in the principal's office, the boys left the school building and proceeded to the sidewalk on the west side of the school grounds where the three boys and Mr. Alexander held a press interview, and pictures, motion pictures and sound tapes were made.

Later the three boys went to a recording studio to write and record a "protest" song about the matter. The recording was completed and the record entitled

[5] Apparently the school also had rules and policies with respect to other aspects of attire and appearance. Girls have been sent home to change their dress because of body exposure; they have been required to remove excessive "make-up" such as too much paint and false eyelashes; they are expected to wear dresses and not tight fitting pants; and were required to wear shoes and not come to school barefooted.

"Keep Your Hands Off It"* was first played on the air Friday morning, September 9. For several days thereafter it was played numerous times on several radio stations.

Administrative procedures established by the Dallas Independent School District for review of a principal's ruling include appeal to the Assistant Superintendent of Administration, then to the Superintendent of Schools and finally to the Board of Education. Efforts were made by or on behalf of the appellants to present their problem to higher school authorities. A conversation on September 7 between the three boys and the Assistant Superintendent of Administration was held on the steps of the school administration building. Appellants went to the office of the Superintendent of Schools but the Superintendent was not there at the time. Later their attorney discussed the matter by telephone with the Superintendent. The attorney was advised that the Superintendent would support the principal's ruling. The President of the Board of Education made a public statement over television that the Super-

*The words of the recording are as follows:
"Went to school, got kicked out,
said it was too long, now we're going to shout.
[Chorus] Keep your hands off of it,
keep your hands off of it,
keep your hands off of it,
it don't belong to you.
Bopped upon the steps, the principal I met,
you're not getting in, now what do you want to bet.
[Chorus]
Went this morning, tried to get in,
the kids were for us, but we still couldn't win.
[Chorus]
HAIR, THAT IS!"

intendent would be backed by the Dallas School Board and that he approved the action of the principal. On September 8 and 9 the boys inquired into the possibility of transferring schools. They were informed by the principal that since the next period for acceptance of applications for transfer did not begin until September 21, he could not take an application for a transfer at that time. The boys also went to seven different schools on September 8 seeking to be admitted, but were unsuccessful.

At the hearing held in the district court much testimony was given regarding the fact that the wearing of long hair by young men and boys is currently in vogue. This fact was said to be especially true in the case of youthful entertainers, particularly rock and roll musicians. The object of such testimony was to demonstrate that long hair was no longer a rare or unusual feature among teenagers and that it had become well accepted by the younger generation.

Nevertheless, Mr. Lanham had a different story to tell about long hair. He recited several examples of the problems caused by boys wearing the Beatle type hair style in school. On one occasion a group of boys in his school had decided that a classmate's hair was too long and that they were going to take the matter in their own hands and trim it themselves. Mr. Lanham stated that boys with long hair were subjected to substantial harassment. Obscene language had been used by some students in reference to others with long hair and girls

had come to his office complaining about the language being used. The long hair boys had also been challenged to a fight by other boys who did not like long hair. Also, long hair boys had been told by others that the girl's restroom was right down the hall. Mr. Lanham mentioned one long hair boy who refused to go to the boy's restroom until the other boys had left. He referred to other incidents where the boys would eat in the lunchroom only with the girls and never eat with the boys.

Several students, sporting a Beatle type haircut also testified at the hearing. Some testified that they had encountered no problems with regard to their hair. However, some of these boys stated that remarks had been made to them by other boys about their hair. Also one student admitted a fight had ensued over the fact that the football "guys" at the school did not like long hair.

During the hearing Mr. Lanham stated on numerous occasions that his decision to refuse appellants admission to school was based solely on the length and style of their hair and was not influenced by other considerations. Appellants' attorney tried in vain to establish that the principal's decision was based, in part, on the actions of Mr. Alexander in calling his home on the evening of September 6 and in alerting the press the next day and the fact that appellants had recorded a protest song about the matter. However, Mr. Lanham did state that he felt that Mr. Alexander by calling

him at his home the evening before enrollment had challenged him. Further, Mr. Lanham stated that he viewed the recording made by appellants as directed towards him personally rather than just a general protest song about hair, and that the recording held him up to ridicule, and that he did not particularly appreciate it. He related the fact that other people had commented on the record and had observed that it did refer to him.

The district court concluded that the school authorities had not acted arbitrarily, capriciously nor unreasonably in refusing to admit appellants to Samuell High School, and therefore, the court denied appellants' application for injunctive relief.

Appellants contend that the action of the school authorities was unlawful under the constitution and laws of the State of Texas. We do not agree.

The Constitution of Texas, Article 7, § 1, Vernon's Ann. Stat., is as follows:

> "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

Pursuant to this authority, the legislature did so establish a state system of public schools. The legislature also, again pursuant to the constitutional mandate, authorized the authorities of the various public schools so established to adopt such rules and regulations as

they deemed proper in order to effectively manage and govern the schools. See Article 2780, Revised Civil Statutes of Texas which provides in part:

> "Said trustees shall adopt such rules, regulations, and by-laws as they may deem proper; and the public free schools of such independent district shall be under their control; and they shall have the exclusive power to manage and govern said schools, . . ."

The constitutional grant of power and authority to school officials was thoroughly discussed by the Texas Court of Civil Appeals in *Wilson v. Abilene Indep. School Dist.*, 190 S.W.2d 406 (1945) in its decision upholding the action of the school which, in effect, prohibited students from having membership in high school fraternities and sororities. We quote from the Texas court's opinion at page 412:

> "It will be seen that the grant of power and authority to school boards is in general terms. The Legislature could not possibly foresee all problems and situations that would arise in the administration of the schools.
>
> * * *
>
> But, necessarily, school boards are given a wide discretion in such matters. They may make all such rules and regulations as in their judgment are necessary to maintain an 'efficient' system of schools subject to the limitation that there be no abuse of discretion, and that such regulations be not arbitrary, unreasonable or in violation of law."

See also *Waugh v. Board of Trustees of University of Mississippi*, 237 U.S. 589, 59 L.ed. 1131.

In view of the testimony of Mr. Lanham as to the various problems which arise in the school due to the wearing of long hair by members of the student body and the testimony of certain students that their hair style had indeed created some problems during school hours, we cannot say that the requirement that appellants trim their hair as a prerequisite to enrollment is arbitrary, unreasonable or an abuse of discretion. Therefore, the school regulation as promulgated by the principal, banning long hair, is not violative of the state constitution or statutes.

Appellants also contend that the action of the school authorities was a denial of substantive and procedural due process under the fourteenth amendment. We conclude, after careful and thoughtful study, that the action complained of does not violate the fourteenth amendment.

Appellants categorize the length and style of their hair as a form of expression, not unlike that of thought and speech, which is constitutionally protected from infringement by the state. We shall assume, though we do not decide, for the purpose of this opinion that a hair style is a constitutionally protected mode of expression. Consequently we are confronted with the question whether a state can prohibit this type of expression in the circumstances here present without running afoul of the fourteenth amendment.

This case brings into focus a sensitive area of the law. Constitutional issues which arise under the Bill of

Rights have been before the courts many times. The decided cases clearly demonstrate that each case must be decided in its own particular setting and factual background and within the context of the entire record before the court in determining whether the rule or the action about which complaint is made is arbitrary, capricious, unreasonable or discriminatory. This approach to the problem is clearly demonstrated by the authorities hereinafter cited as well as the following: *Thornhill v. State of Alabama*, 310 U.S. 88, 101, 84 L.ed. 1093, 1102; *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 627, 87 L.ed. 1628, 1637; *Dennis v. United States*, 341 U.S. 494, 510, 95 L.ed. 1137, 1153; *Whitney v. People of the State of California*, 274 U.S. 357, 376, 71 L.ed. 1094, 1106. In *Dennis v. United States, supra*, the Supreme Court approved, as a general rule, the following statement by Chief Judge Learned Hand:

> "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

The Constitution does not establish an absolute right to free expression of ideas, though some might disagree.[1] The constitutional right to free exercise of

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[1] Mr. Justice Black made the following statement in his dissent in Binzburg v. United States, 383 U.S. 463, 16 L.ed.2d 31 (1966):

> "• • • as I have said many times, I believe the Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind (as distinguished from conduct), • • •"

speech, press, assembly, and religion may be infringed by the state if there are compelling reasons to do so.[4]

The compelling reason for the State infringement with which we deal is obvious. The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right.

In *Blackwell v. Issaquena County Board of Ed.*, 363 F. 2d 749 (5 Cir. 1966) we denied school children the right to wear freedom buttons to school. Unquestionably those wearing the buttons were exercising their protected rights of free speech and free communication of ideas. However, we upheld the school's rule prohibiting the wearing of the buttons during school hours on the ground that the evidence clearly demonstrated that such activity interfered with the efficient operation of the school.[5]

Several cases have been before the courts with factual situations similar to the instant case. In each the

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[4] For example, see Konigsberg v. State Bar of California, 366 U.S. 36, 6 L.ed.2d 105 (1961); Roth v. United States, 354 U.S. 476, 1 L.ed.2d 1498 (1957); Reynolds v. United States, 98 U.S. 145, 25 L.ed. 244 (1879).

[5] Compare Burnside v. Byars, 363 F. 2d 744 (5 Cir. 1966) where the right to wear freedom buttons was not denied the school children because there was a lack of evidence that such conduct constituted any interference with the educational process.

students were denied admission to or suspended from school until they acquired an acceptable haircut. The students contended, inter alia, that the school's regulation was unconstitutional, that it was unreasonable or arbitrary, and that it was an invasion of the right of privacy. These contentions were rejected by the courts[9] in *Leonard v. School Committee of Attleboro*, 212 N.E. 2d 468 (Mass. Sup. Jud. Ct. 1965) and *Marshall v. Oliver* (Case No. B-2932, Cir. Ct. of the City of Richmond, Dec. 20, 1965)." In both cases the court held that the regulation which barred a student with an extreme haircut because of its length and style was not unreasonable or arbitrary in that the regulation was reasonably calculated to maintain school discipline. However, the district court in *Zachry v. Brown* (N.D. Ala., No. 66-719, June 30, 1967, unpublished) agreed with plaintiffs, who were suspended from Jefferson State Junior College, a public institution of the State of Alabama, for failure to conform to regulations pertaining to permissible hair styles, that such regulation was unreasonable and failed to "pass constitutional muster." However, the district judge clearly pointed out in his opinion that such regulation was promulgated solely because the school administrators thoroughly disliked what they considered exotic hair styles. No suggestion was made

[9] The opinion of the trial court is apparently not published and the Supreme Court of Appeals of Virginia denied certiorari without opinion. The United States Supreme Court also denied certiorari. 385 U.S. 945, 17 L.ed. 225. The opinion of the trial court is set forth in an appendix to appellee's brief.

that such haircut had any effect upon the health, discipline, or decorum of the institution. Thus *Zachry* is essentially different from this case.

We conclude that there was no denial of substantive due process; and further, we find no evidence in the record to support appellants' contention that they were denied procedural due process.

We recognize that appellants are professional musicians performing as a musical combo. Their right to follow this chosen business or occupation free from unreasonable governmental interference comes within the liberty and property concepts of the Fifth Amendment. *Green v. McElroy*, 360 U.S. 474, 3 L.ed. 2d 1377 (1959). The action taken by the school authorities does not, in our view, interfere with appellants' right to continue in their chosen occupation of professional rock and roll musicians. It is common knowledge that many performers are required to use special attire and make-up, including wigs or hairpieces, for their public appearances. At this stage in appellants' lives school may be more important than their commercial activities. In any event, we do not feel that their business activity is eliminated, as a practical matter because of the school's rules and regulations.

Appellants' final contention is that the school regulation is discriminatory under the Civil Rights Act, 42 U.S.C. §§ 1981 and 1983. We find no violation of the civil rights statutes. *Byrd v. Sexton*, 277 F. 2d 418 (8 Cir. 1960).

As noted earlier the district court conducted a full and extensive hearing during which a number of witnesses appeared and documentary evidence was introduced. The parties were afforded ample opportunity to present their evidence and the facts were fully developed. The parties clearly presented the controlling legal authorities to the court. Thereafter, the court rendered a full opinion in which there were findings of fact and conclusions of law, denying the motion of the appellants for a temporary injunction. We are unable to find an abuse of discretion. *Brewer v. Huger*, 358 F. 2d 739 (5 Cir. 1966); *United States v. Edwards*, 333 F. 2d 575 (5 Cir. 1964); *Detroit Football Company v. Robinson*, 283 F. 2d 657 (5 Cir. 1960).

For the several reasons hereinabove discussed, we affirm the judgment of the district court.

JUDGMENT AFFIRMED.

GODBOLD, Circuit Judge, SPECIALLY CONCURRING:

I concur fully in the opinion of Judge Gewin and add some views of my own.

The American community groups together in its schools hundreds, even thousands, of energetic, volatile and sometimes aggressive young people in close contact with one another and in confined areas, during a substantial part of each school day for three fourths of each year and twelve years of their lives.

The bare process of teaching them in the traditional sense demands the best that the profession can offer. But in addition we call upon the schools to give our children driver training, vocational skills, public speaking, music instruction, and sex education, and to maintain their physical fitness, to carry on ever-broadening athletic programs, engage in fund raising, and plan, produce and chaperone social events. Whether it should or should not do so, the American community calls upon its schools to, in substance, stand *in loco parentis* to its children for many hours of each school week.

Citizens expect and demand that their children be physically safe in the schools to whose supervision they are consigned, and the citizenry is outraged if the schools are less than safe and orderly. At the same time we expect that the requirements of order, and of protection and implementation of the educational program of the school, will be met by limited enforcement means — the force of the school establishment itself and the school-related disciplines of reprimand, suspension, and expulsion — recognizing that the schoolroom is an inappropriate place for the policeman to be either called or needed.

A school may not stifle dissent because the subject matter is out of favor. Free expression is itself a vital part of the educational process. But in measuring the appropriateness and reasonableness of school

regulations against the constitutional protections of the First and Fourteenth Amendments the courts must give full credence to the role and purposes of the schools and of the tools with which it is expected that they deal with their problems, and careful recognition to the differences between what are reasonable restraints in the classroom and what are reasonable restraints on the street corner.

TUTTLE, Circuit Judge, DISSENTING:

With deference to the views of my colleagues, I dissent. It does seem as though this issue is something of a tempest in a teapot. However, we are faced with the problem of three teenage school children in Dallas, Texas, being denied a high school education because the length of their hair did not suit the school authorities. Upon the assumption made by the court in its opinion that "for the purpose of this opinion a hairstyle is a constitutionally protected mode of expression," I would say that there is no countervailing state need or requirement that would warrant such interference with the constitutional first amendment right under the standard adopted by the Court in the quotation from *Dennis v. United States*, 341 U.S. 494: "In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Moreover, even though the method of wearing the hair is not constitutionally protected under the First

Amendment, it appears to me, without the slightest doubt that this is an utterly unreasonable classification of students by the state in granting or denying the right of a public education. This of course, if true, is violative of the Fourteenth Amendment.

So far as the majority opinion finds support in *Blackwell v. Issaquena County Board of Education*, 363 F. 2d 749, I take this first opportunity, with deference, to note my disagreement with the holding there.[1] I think both in that case and upon the record before us here, we find courts too prone to permit a curtailment of a constitutional right of a dissenter, because of the likelihood that it will bring disorder, resistance or improper and even violent action by those supporting the status quo. It seems to me it cannot be said too often that the constitutional rights of an individual cannot be denied him because his exercise of them produces violent reaction by those who would deprive him of the very rights he seeks to assert. In *Terminiello v. Chicago*, 337 U.S. 1, the United States Supreme Court said:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs peo-

[1] In *Issaquena* the trial court denied an injunction to prohibit the continued suspension of some 300 Mississippi students for wearing "freedom" buttons. It will be noted that the opinion of this court affirming the judgment cited at length, in three footnotes, disorderly conduct by *some* of the button-wearing students, *after* the principal had issued his order to the original small number of wearers to stop wearing the buttons. No effort was made to discipline the small number of button-wearers who created noise and disturbance. Instead the principal struck at the idea of wearing the buttons itself.

> ple to anger. Speech is often provocative and challenging. It might strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, supra, pp. 571-572, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest * * * * There is no room under our Constitution for a more restrictive view * * * * The ordinance as construed by the trial court, seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of these grounds may not stand."

These boys were not barred from school because of any actions carried out by them which were of themselves a disturbance of the peace. They were barred because it was anticipated, by reason of previous experiences, that their fellow students in some instances would do things that would disrupt the serenity or calm of the school. It is these acts that should be prohibited, not the expressions of individuality by the suspended students.

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UNITED STATES COURT OF APPEALS

For the Fifth Circuit

October Term, 1967

No. 24301

D. C. Docket No. CA 3-1670
L. W. FERRELL and Jo FERRELL,
Next Friends of PHILLIP FERRELL, ET AL.,
Appellants,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, ET AL.,
Appellees.

Appeal from the United States Court for the Northern District of Texas.

Before TUTTLE, GEWIN and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, L. W. Ferrell and Jo Ferrell, Next Friends of Phillip Ferrell, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.
GODBOLD, Circuit Judge, specially concurs.

TUTTLE, Circuit Judge, dissents.
Issued as Mandate: May 8, 1968

March 29, 1968

B-23

In the

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 24301

L. W. FERRELL and Jo FERRELL,
Next Friends of PHILLIP FERRELL, ET AL.,
Appellants,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(April 30, 1968)

ON PETITION FOR REHEARING

Before TUTTLE, GEWIN and GODBOLD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

TUTTLE, Circuit Judge, Dissents

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APPENDIX C

The Constitution of the State of Texas, Article VII, Section 1, provides as follows:

> A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

Article 2902, Vernon's Annotated Texas Civil Statutes, provides as follows:

> All children, without regard to color, over six years of age and under eighteen years of age at the beginning of any scholastic year, shall be included in the scholastic census and shall be entitled to the benefit of the public school fund for that year. The board of school trustees of any city or town or independent or common school district shall admit to the benefits of the public schools any person over six and not over twenty-one years old at the beginning of the scholastic year, if such person or his parents or legal guardian reside within said city, town or district.

Article 2904, Vernon's Annotated Texas Civil Statutes, provides as follows:

> The trustees of schools shall have the power to admit pupils over and under scholastic age, either in or out of the district, on such terms as they may deem proper and just; provided, that in admitting pupils over and under the scholastic age, the school shall not be overcrowded to the neglect and injury of pupils within the scholastic age. They may suspend from the privileges of schools any pupil found

guilty of incorrigible conduct, but such suspension shall not extend beyond the current term of the school.

Section 1981 of 42 U.S.C., the Civil Rights Act, provides as follows:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977.

Section 1983, 42 U.S.C., the Civil Rights Act, provides as follows:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.